UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

JULIO PEREZ-RUIZ, Petitioner, v. UNITED STATES OF AMERICA, Respondent.	Civil No. 06-1163 (JAF) (Crim. No. 00-0048)

OPINION AND ORDER

This court resentenced Julio Pérez-Ruiz ("Petitioner"), on May 20, 2004, to 235 months imprisonment for violations of 21 U.S.C. §§ 841 & 846 (1999), during his involvement in a narcotics conspiracy. Cr. Case No. 00-048, Docket Document No. 880. The United States Court of Appeals for the First Circuit has affirmed Petitioner's conviction, United States v. Perez-Ruiz ("Perez-Ruiz I"), 353 F.3d 1, 6 (1st Cir. 2003), and his resentencing. United States v. Perez-Ruiz ("Perez-Ruiz II"), 421 F.3d 11 (1st Cir. 2005).

Pursuant to 28 U.S.C. § 2255 (1994 & Supp. 2005), Petitioner now files for post-conviction relief. Docket Document No. 1.

I.

Procedural History

The procedural history and underlying details of the present case have been enunciated in the First Circuit's handling of Petitioner's previous two appeals, and we, therefore, keep our recitation of the facts brief. Perez-Ruiz I, 353 F.3d 1; Perez-Ruiz

II, 421 F.3d 11. In June 2000, Petitioner was indicted by a grand jury for conspiring to distribute heroin, cocaine, and cocaine base in violation of 21 U.S.C. § 846, Cr. Case No. 00-048, Docket Document Nos. 2, 5, and was found guilty by jury trial on July 26, 2001. Cr. Case No. 00-048, Docket Document No. 676. On March 18, 2002, citing 21 U.S.C. § 841(b)(1)(A) as the relevant penalty provision, and applying the murder cross-reference of U.S. Sentencing Guidelines Manual § 2D.1(d)(1), this court sentenced Petitioner to life imprisonment. Cr. Case No. 00-048, Docket Document No. 772. Section 841(b)(1)(A) provides the sentencing range for § 841 convictions when the drug quantities involved are in excess of certain thresholds. 21 U.S.C. § 841(b)(1)(A).

On appeal, the First Circuit affirmed Petitioner's conviction, but found that this court had erred, pursuant to Apprendi v. New Jersey, 530 U.S. 466, 490 (U.S. 2000), in applying § 841(b)(1)(A) without the jury having made specific findings regarding drug quantity. Perez-Ruiz I, 353 F.3d at 15-17. The First Circuit remanded the case for resentencing, noting that the default statutory maximum applicable was twenty years as derived from 21 U.S.C. § 641(b)(1)(c). Id. at 15 (citing United States v. LaFreniere, 236 F.3d 41, 49 (1st Cir. 2001)).

On May 20, 2004, this court resentenced petitioner to 235 months imprisonment. Cr. Case No. 00-048, Docket Document No. 880. Petitioner appealed, and the First Circuit affirmed the judgment on

August 26, 2005. Perez-Ruiz II, 421 F.3d 11. Petitioner filed the present § 2255 motion on February 9, 2006, Docket Document No. 1, later resubmitting the motion to correct a procedural technicality. Docket Document No. 8. The Government responded in opposition on March 30, 2006. Docket Document No. 12.

II.

Framework and Relief Under Section 2255

A federal district court has jurisdiction to entertain a § 2255 motion only where the petitioner is currently in custody under the sentence of a federal court. See 28 U.S.C. § 2255. Section 2255 provides four grounds under which a federal prisoner who seeks to challenge the imposition or length of his sentence may seek relief. Id. A petitioner may argue that: (1) the court imposed the sentence in violation of the Constitution or laws of the United States; (2) the court was without jurisdiction to impose such a sentence; (3) the sentence was in excess of the maximum time authorized by law; and/or (4) the sentence is otherwise subject to collateral attack. See id. Should a court find any of these errors, it "shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." Id. Claims that do not allege constitutional or jurisdictional errors may be brought under § 2255 only if the claimed error would result in a complete miscarriage of justice. See Knight v. United States, 37 F.3d 769, 772 (1st Cir. 1994) (citing Hill v.

United States, 368 U.S. 424, 428 (1962)). Section 2255 "does not grant jurisdiction over a post-conviction claim attacking the execution, rather than the imposition or illegality of the sentence." United States v. DiRusso, 535 F.2d 673, 674 (1st Cir. 1976).

A petitioner seeking relief under § 2255 also must demonstrate, by a preponderance of the evidence, an entitlement to relief or a hearing. See Barrett v. United States, 965 F.2d 1184, 1186 (1st Cir. 1992). Summary dismissal of a § 2255 petition is appropriate when the motion "(1) is inadequate on its face, or (2) although facially adequate, is conclusively refuted as to the alleged facts by the files and records of the case." United States v. DiCarlo, 575 F.2d 952, 954 (1st Cir. 1978) (quoting Moran v. Hogan, 494 F.2d 1220, 1222 (1st Cir. 1974)). When claims are based on facts with which the district court is familiar, "the court may make findings without an additional hearing, and, as in the case for findings of the trial court generally, those findings will not be overturned unless they are clearly erroneous." DiCarlo, 575 F.2d at 954-55.

III.

Discussion

In support of his § 2255 petition, Petitioner argues that: (1) at resentencing, the court violated his right to due process when it made erroneous factual findings relating to his crime as to drug type, drug quantity, firearm possession, and leadership role; (2) the court considered false and unreliable information during his original

and resentencing hearings; (3) the court's failure to submit drug type and quantity determinations to the jury was a form of structural error under United States v. Booker, 543 U.S. 220 (2005); and (4) his counsel's failure to argue the preceding points on appeal amounts to ineffective assistance of counsel. Docket Document No. 1.

Some of Petitioner's arguments have already been presented to, and rejected by, the First Circuit on direct appeal. The First Circuit disposed of nearly all of Petitioner's first argument, with the exception of the firearm possession question. Perez-Ruiz II, 421 F.3d at 15-16 (holding that the findings about drug type, quantity, and leadership role were supported). The First Circuit has also disposed of Petitioner's Booker claim and his assertion that such errors are structural in nature.[1] Perez-Ruiz I, 353 F.3d at 17; Perez-Ruiz II, 421 F.3d at 17.

Because issues resolved by prior appeal will not be reviewed again by way of a § 2255 motion, we must dismiss Petitioner's first (with the exception of the firearm possession question) and third arguments. Murchu v. United States, 926 F.2d 50, 55 (1st Cir. 1991). We move forward to Petitioner's surviving arguments.

A. Gun Possession

[1] We note that the recent Supreme Court opinion in Washington v. Recuenco, referenced by Petitioner in his § 2255 motion, confirms the First Circuit's position that failure to submit a sentencing factor to the jury, such as drug type and quantity, is not a form of structural error. 2006 U.S. LEXIS 5164 (U.S. 2006).

Petitioner argues that at sentencing, the court erred when applying a two-point sentencing enhancement without noting a specific time or incident where Petitioner possessed a firearm during the conspiracy. Docket Document No. 1.

Although Petitioner asserts that the misapplication of the sentencing guidelines violated his due process rights, it has long been held that such errors are non-constitutional in nature. Mateo v. United States, 398 F.3d 126, 136 (1st Cir. 2005) (treating misapplication of sentencing guidelines as a non-constitutional claim); Cofske v. United States, 290 F.3d 437, 441 (1st Cir. 2002) ("a guideline violation alone is not automatically a basis for relief under 28 U.S.C. § 2255"). Collateral attack for claims outside the constitutional or jurisdictional context are cognizable "only where the alleged error presents 'a fundamental defect which inherently results in a complete miscarriage of justice' or 'an omission inconsistent with the rudimentary demands of fair procedure.'" Cofske, 290 F.3d at 441 (citing Hill v. United States, 368 U.S. 424 (1962)).

Under U.S. Sentencing Guidelines Manual § 2D1.1(b)(1), a judge can increase an offense level by two points if a dangerous weapon, including a firearm, was possessed. This enhancement applies if a weapon was present, unless it is clearly improbable that the weapon was connected with the charged offense. U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(b)(1), comment, (n.3); United States v. McDonald, 121 F.3d 7,

10 (1st Cir. 1997). In a conspiracy case, such as this one, the prosecution must show that either the defendant or his co-conspirators possessed a weapon during the offense. United States v. Nelson-Rodriguez, 319 F.3d 12, 59 (1st Cir. 2003) (citing McDonald, 121 F.3d at 10). Once the prosecution makes such a showing, the defendant then bears the burden to establish that a connection between the weapon and the crime was clearly improbable. Id.

Included among the evidence of firearm possession presented at Petitioner's trial was the testimony of a police officer who, during a traffic stop of Petitioner's vehicle in April 1996, witnessed an object, later discovered to be a firearm, being thrown from the car. Cr. Case No. 00-048, Docket Document No. 905, p. 4. At resentencing, Petitioner's counsel argued that this incident was not grounds for applying the two-point sentencing enhancement as it did not have any ties to the drug charges for which Petitioner was convicted. Id.

The government argued that in addition to the April 1996 incident, it could be inferred by a preponderance of the evidence that Petitioner had possessed a firearm during 1997 while he was the owner of a drug point. Id. at 9. The undersigned agreed, and noted that additional evidence in the record showed that Petitioner's co-conspirators had also used firearms in the administration of the drug point. Id. at 9-10. While Petitioner arguably met the burden of persuading the court that a connection between the April 1996 incident and the administration of the drug point was clearly

improbable, McDonald, 121 F.3d at 10, he failed to meet this burden as to the evidence relating to his co-conspirators' firearm possession. Consequently, pursuant to § 2D1.1(b)(1) of the sentencing guidelines, this court correctly found that Petitioner was eligible for the two-point enhancement.

No error occurred in the application of the firearm sentencing enhancement, let alone one so fundamental that it resulted in a 'miscarriage of justice.' Cofske, 290 F.3d at 441. We, therefore, reject Petitioner's claim on the grounds that it is not cognizable under § 2255.

B. False and Unreliable Evidence

Petitioner next claims that this court erred in basing its factual findings at sentencing upon false and unreliable evidence. Docket Document No. 1. Specifically, Petitioner claims that the testimony of two prosecution witnesses, Joel Irizarry Rosario and Frankie Pietri Sepúlveda, should have been disregarded by this court as Petitioner had no association or involvement with either party. Id. Petitioner claims that this court failed to resolve the dispute between his version of events and that submitted in the presentence investigation report ("PSI report"). Id.

A district court has a duty to base sentencing judgments upon reliable and accurate information and must consider all available evidence, including evidence that conflicts with what has been adduced at trial. United States v. Tavano, 12 F.3d 301, 305 (1st

Cir. 1993). This duty is derived from the Due Process Clause, "which guarantees every defendant a right to be sentenced upon information which is not false or materially incorrect." Id. Pursuant to Federal Rule of Criminal Procedure 32(i)(3)(B), at sentencing, a court must rule on any disputed portion of the PSI report or determine that such a ruling is unnecessary. FED. R. CRIM. P. 32(i)(3)(B).

The U.S. Probation Office prepared and filed a PSI report on November 8, 2001, Cr. Case No. 00-048, Docket Document No. 723, to which Petitioner filed an objection on December 19, 2001. Cr. Case No. 00-048, Docket Document No. 735. After the First Circuit's remand of the case for resentencing, Petitioner filed another objection to the PSI report, Cr. Case No. 00-048, Docket Document No. 873, to which the government replied on March 20, 2004. Cr. Case No. 00-048, Docket Document No. 875. Petitioner's objections stated that the evidence did not support application of the cross-reference for first-degree murder, noting that the only evidence for this was the testimony of Irizarry, and arguing that his testimony was unreliable. Cr. Case No. 00-048, Docket Document No. 873. Petitioner further argued that the PSI report failed to make any calculation based on the drug type and quantity attributable to him. Id.

At sentencing, this court heard Petitioner's counsel's objections as to the credibility of Irizarry, and expressed our view that the jury should have believed his testimony. Cr. Case No. 00-

048, Docket Document No. 905, pg. 8. Nevertheless, this court agreed with Petitioner and declined to reapply the murder cross-reference. Id. at 15. Petitioner's counsel next objected to the court's finding that a preponderance of evidence showed that Petitioner could be attributed with 15 kilos of cocaine insofar as that reliance was based on the testimony of Pietri. Id. at 19. This court considered Petitioner's argument, but ultimately found that the trial record showed that a finding of 15 kilos of cocaine was a very conservative estimate. Id. at 21.

As required, this court made independent assessments of the evidence presented at trial, and issued rulings from the bench regarding Petitioner's disputes with the submitted PSI report. Id. at 15-29. Petitioner's claim that he was denied his right to due process by being sentenced upon false or incorrect information is contravened by the record of the resentencing proceedings, and must therefore be rejected.

C. Ineffective Assistance of Counsel

Petitioner's final claim is that he suffered from ineffective assistance of counsel at the appellate level as his attorneys failed to raise the arguments that compose his § 2255 claim. Docket Document No. 1.

In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court provided the applicable bipartite standard of review for ineffective assistance of counsel claims. Strickland states that:

> A convicted defendant making a claim of ineffective assistance of counsel must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.

466 U.S. at 690. Once a petitioner identifies his counsel's unprofessional acts or omissions, he must then show that such acts or omissions prejudiced him. Id. at 692. Specifically, petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceedings would have been different." Id. at 694. Petitioner has the same constitutional right to effective assistance of counsel at the appellate level as he is entitled to at trial. Evitts v. Lucey, 469 U.S. 387, 399 (1985)

"Appellate counsel who files a merits brief need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal." Smith v. Robbins, 528 U.S. 259, 288 (2000) (citing Jones v. Barnes, 463 U.S. 745 (1983)). While it is possible to bring a Strickland claim based on counsel's failure to raise a particular claim, the Supreme Court has indicated that satisfying the first part of the Strickland test requires a showing that the ignored issues were "clearly stronger than issues that counsel did present." Campbell v. United States, 108 Fed. Appx. 1, 3 (1st Cir. 2004) (citing Robbins, 528 U.S. at 288).

Even if we were to assume arguendo that Petitioner's claim did satisfy the first prong of the Strickland test, that counsel's performance fell below an objective standard of reasonableness, we cannot see how Petitioner could satisfy the second prong of Strickland, which requires Petitioner to show that he was prejudiced by counsel's alleged errors.

The First Circuit, regardless of whether Petitioner's counsel raised such arguments, did in fact consider the validity of this court's factual findings as to drug type, quantity, and leadership role, ultimately holding that such findings were adequately supported by the evidence on the record. Perez-Ruiz II, 421 F.3d at 15-17. Although the appellate court did not consider the validity of the two point sentencing enhancement applied due to firearm possession, as we note earlier, there is a preponderance of evidence in the record to support such a finding. See supra III.B. As the claims that Petitioner's attorney allegedly failed to raise have been rejected on the merits, we do not believe that there is a reasonable probability that the result of the sentencing or its appeal would have been different had such arguments been presented. See e.g. Mathison v. Cunningham, 2001 DNH 85 (D.N.H. 2001) ("To establish prejudice, the petitioner must demonstrate that there is a reasonable probability that the result of the proceedings would have been different had he[] received competent representation."). As a result, we dismiss Petitioner's ineffective assistance of counsel claims.

IV.

Conclusion

In accordance with the foregoing, we **DENY** Petitioner's motion for a writ of habeas corpus. Pursuant to Rule 4(b) of the Rules Governing § 2255 Proceedings, summary dismissal is in order because it plainly appears from the record that Petitioner is not entitled to § 2255 relief in this court.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 19th day of July, 2006.

S/José Antonio Fusté
JOSE ANTONIO FUSTE
Chief U. S. District Judge